IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-116

THE OKLAHOMA PUBLISHING COMPANY, *et al.*,
*Petitioners,*

v.

THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*, *Respondents,*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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MISCELLANEOUS:



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Petitioners respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on January 13, 1978 and March 16, 1978. This petition seeks review of more than a single case pursuant to Rule 23(5).

### OPINIONS BELOW

The opinion of the Court of Appeals in No. 76-1625, one of the decisions as to which certiorari is sought, was filed on January 13, 1978. It has not been

reported and is set forth herein at 30a-31a.[1] An earlier opinion of the Court of Appeals, filed August 8, 1975, in a connected case, No. 74-1676, is also unreported and is set forth herein at 11a-14a. The District Court's Memorandum Opinion and Order, filed May 11, 1976 and its supplemental Order, filed June 18, 1976, are not officially reported and are set forth herein at 15a-29a.

The opinion of the Court of Appeals in No. 77-1531, the related decision as to which certiorari is sought, was filed on March 16, 1978. It has not been reported and is set forth herein at 36a-37a. The District Court's Order filed May 4, 1977, is not officially reported and is set forth herein at 34a-35a.

## GROUNDS ON WHICH CERTIORARI JURISDICTION IS INVOKED

The judgment of the United States Court of Appeals for the Tenth Circuit in No. 76-1625 was entered on January 13, 1978. A Petition for Rehearing and a Suggestion for Rehearing En Banc were timely filed and were denied on April 6, 1978, 32a-33a. The judgment of the Court of Appeals in No. 77-1531 was

[1] The decision was rendered in a consolidated proceeding. The consolidation was ordered by the District Court for the Western District of Oklahoma. The cases which were consolidated were styled The Oklahoma Publishing Company, et al. (OPUBCO) v. Powell, et al. (No. CIV-74-295-E), which involved a complaint essentially to enjoin officials of the Equal Employment Opportunity Commission (EEOC) from pursuing certain charges of alleged employment discrimination made against OPUBCO, and Equal Employment Opportunity Commission v. The Oklahoma Publishing Company, et al. (No. CIV-76-0109-E), in which the EEOC sought an Order to Show Cause why its subpoena duces tecum against OPUBCO should not be enforced.



entered on March 16, 1978. Petitioner's application for an order extending the time in which to file this petition until July 21, 1978 was granted by Mr. Justice White on June 2, 1978. A-1017. Jurisdiction to review the Court of Appeals' judgments by writ of certiorari is conferred by 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

1. Whether in a proceeding to enforce an EEOC subpoena a respondent is entitled to be heard on its claim that the subpoena should not be enforced because the Commissioner's charges underlying it are void as having been brought in retaliation for the respondent's prior exercise of its First Amendment right to petition Congress for redress of a grievance?

2. Whether under the principle laid down in *Marshall* v. *Barlow's Inc.*, —— U.S. ——, 98 S.Ct. 1816 (1978), the EEOC is required to demonstrate that the subpoena which it seeks to enforce is based upon charges brought only pursuant to a purpose properly authorized by Congress and consistent with the Fourth Amendment?

3. Whether the statutory scheme for enforcing EEOC subpoenas is violative of the Fourth Amendment if, as held below, it permits a District Court to enforce an EEOC subpoena (a) without requiring the EEOC to demonstrate "probable cause" under *Marshall* v. *Barlow's, Inc.*, —— U.S. ——, 98 S.Ct. 1816 (1978), and (b) without permitting the subpoena respondent an opportunity to be heard on its claim that enforcement of the subpoena would be an abuse of the court's process under *United States* v. *Powell*, 379 U.S. 48 (1964)?

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the interpretation and application of Sections 706, 709(a), and 710 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-5, 8(a), 9. The text of those sections is set forth herein at 1a-9a. This case also involves the interpretation and application of the Fourth Amendment to the United States Constitution and derivatively involves the interpretation and application of the First and Fifth Amendments to the United States Constitution. The text of those amendments is set forth herein at 10a.

## STATEMENT OF THE CASE

Petitioners are The Oklahoma Publishing Company and affiliated companies ["OPUBCO"].[2] Respondents are the U. S. Equal Employment Opportunity Commission ["the EEOC" or "the Commission"], certain individual members and employees, and the District Court judge ordering enforcement of the Commission's subpoena herein. This petition arises from the Court of Appeals' affirmance of a District Court order enforcing a Commission subpoena which was granted without permitting OPUBCO an opportunity to be heard on its claim that the subpoena and its underlying charges were void because the charges were brought against OPUBCO by the Commission solely in retaliation for

[2] The Oklahoma Publishing Company is acting individually and on behalf of its Oklahoma Graphics and National Packaging Divisions. The other petitioners are Gaylord Broadcasting Company and Mistletoe Express Service (both wholly-owned subsidiaries of the Oklahoma Publishing Company).



OPUBCO's exercise of its First Amendment rights. This petition also arises from a connected case in which the Court of Appeals affirmed the District Court's refusal to convene a three-judge court for the purpose of declaring unconstitutional Sections 709(a) and 10 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 20003-8(a), 9, to the extent those sections permitted the District Court to enforce an EEOC subpoena without first requiring the EEOC to make the "probable cause" showing ultimately required by *Marshall* v. *Barlow's Inc.*, —— U.S. ——, 98 S.Ct 1816 (1978).[3]

On October 16, 1973, Ethel Bent Walsh, an EEOC Commissioner, filed charges pursuant to § 706(a) of the Civil Rights Act of 1964 ("the Act"), 42 U.S.C. § 2000e-5(a), against OPUBCO and all of its facilities which are located in many parts of the country. The charges alleged that she had reasonable cause to believe that OPUBCO and all of its affiliates violated Sections 703(a) and (d) of the Act, 42 U.S.C. § 2000e-2(a)(d), by discriminating against virtually every protected class of employee and as to virtually every prohibited employment practice. The charges were served accompanied by interrogatories requesting extensive document production.

OPUBCO unsuccessfully attempted to obtain from the Commission a statement of the basis for the Commissioner's charges. OPUBCO, having reason to believe that the charges were in retaliation both for OPUBCO's refusal to settle a prior charge and its complaint to certain members of Congress concerning

[3] The complaint was patterned after *Barlow's Inc.* v. *Usery*, 424 F. Supp. 437, *aff'd sub nom.*, *Marshall* v. *Barlow's, Inc.*, —— U.S. ——, 98 S.Ct. 1816 (1978).

the Commission's handling of that prior charge, filed an action, *OPUBCO* v. *Powell, et al.,* CIV-74-295-E, (W.D. Okla.) *supra,* seeking declaratory and injunctive relief against the investigation of Commissioner Walsh's charges. The District Court dismissed the complaint which, on appeal, No. 74-1676, was ordered reinstated but litigation thereof suspended pending completion on the Commission's administrative process.

The Commission then issued and ultimately sought enforcement pursuant to Section 710 of the Act, 42 U.S.C. § 2000e-9 in the District Court (CIV-76-0109-E, W. D. Okla.) of a subpoena duces tecum which sought formally the same documents requested by the interrogatories accompanying the Commissioner's charges. In response to the Commission's petition for enforcement, OPUBCO again sought an opportunity to prove that the subpoena and the charges upon which it was based were motivated by an improper purpose justifying the District Court's refusal to enforce the subpoena and enjoin the investigation. The District Court substantially enforced the subpoena but refused to permit the hearing requested by OPUBCO until the Commission completed its entire investigation. The District Court's order was affirmed by the Court of Appeals. No. 76-1625. 30a-31a.

In support of its request for a hearing, OPUBCO had submitted the affidavits of Charles A. Kothe, Esquire, one of its attorneys, and Robert H. Spahn, its production manager. These affidavits, 38a-44a, recited that the affiants on April 6, 1973 met with Ray R. Baca, then Supervisor of Conciliations for the Commission's Albuquerque district office, to conciliate or settle a race discrimination charge filed against one



of the OPUBCO facilities by David D. Williams. After the Commission had rendered an adverse administrative determination on Mr. Williams' charge but before the settlement conference, OPUBCO's Executive Vice-President wrote a letter to several U.S. Senators and Representatives which was critical of the Commission's handling of the *Williams* case. The affidavits stated that at the meeting with Mr. Baca, there was no attempt by him to compromise the parties' positions on the *Williams* case, but rather, that Mr. Baca used the occasion to warn the OPUBCO representatives (1) that they and OPUBCO's Executive Vice-President would be sent to jail because of the letter to the Senators and Congressmen; (2) that unless OPUBCO settled the *Williams* case it would cost OPUBCO "7 million" to defend a subsequent EEOC lawsuit; (3) that OPUBCO would be "sorry" for having written the letter; and (4) that the EEOC would "get" OPUBCO.

These discussions terminated without any resolution of the charge and neither Mr. Williams nor the Commission on his behalf pursued available judicial remedies. The next occurrence was the filing of Commissioner Walsh's charges on October 16, 1973. Mary T. Matthies, Esquire, an OPUBCO attorney, filed an affidavit with the Court of Appeals and recited a conversation she had with an attorney for the Commission who stated that the request for the Commissioner's charges had originated with Mr. Baca's Albuquerque district office. 45a-46a.

After the District Court ordered enforcement of the Commission's subpoena, OPUBCO filed an action (CIV-77-0261-B, W.D. Okla.) pursuant to 28 U.S.C. §§ 1331, 1337, 1361, and the Fourth Amendment in

which it sought a declaration that Sections 709(a) and 10 of the Act, 42 U.S.C. 2000e-8(a), 9, were violative of the Fourth Amendment to the extent they permitted enforcement of the Commission's subpoena without requiring the Commission to make a "probable cause" showing of the nature required by *Marshall* v. *Barlow's, Inc.*, —— U.S. ——, 98 S. Ct. 1816 (1978).[4] The District Court dismissed the complaint and its order was affirmed by the Court of Appeals in No. 77-1531.

Subsequent to the District Court's subpoena enforcement order and the denials of stay requests of that order, on November 15, 1977, the Commission commenced its inspection of documents made available by OPUBCO in compliance with the subpoena as enforced. Commission investigators inspected documents on that date, on March 21-23, 1978, and on March 29-April 11, 1978. The Commission has not rendered a determination as to the pending charges and, on June 21, 1978, a Commission investigator filed an affidavit in the District Court stating that more information was needed before the investigation could be completed and that such completion was not expected for a substantial period of time.

## REASONS FOR GRANTING THE WRIT

### I. BY DENYING OPUBCO A HEARING, THE COURTS BELOW HAVE RENDERED DECISIONS CONFLICTING WITH PRIOR DECISIONS OF THIS AND OTHER COURTS

At the outset, we wish to make clear the nature of the relief which petitioners seek. They do not seek an opportunity to litigate the merits of the Commission-

[4] The appeal in 76-1625 was taken as a protective matter pending requests for stays thereof and potential need to file this action if the stay requests were denied.



er's charges prior to being required to undergo the Commission's investigation. They do seek the opportunity to establish at the outset that the Commissioner's charges of employment discrimination were filed not because she had some reason for believing them to be true but rather, to harass, intimidate, and punish OPUBCO because it had refused to settle a prior charge (the *Williams* case) and had complained to members of Congress of the inappropriate manner in which the Commission had handled the prior matter.

If petitioners' allegations are established, the Commission would not be permitted to invoke a court's process (as was done here with a subpoena enforcement proceeding) because to do so would constitute an abuse of the court's process. *United States* v. *Powell*, 379 U.S. 48, 58 (1964). To date, however, without being afforded any opportunity for a hearing on its claim, OPUBCO is being required to respond to an extensive subpoena and otherwise undergo a Commission investigation which has been lengthy and will continue to expand in scope.

During the more than four years OPUBCO has been pressing its claim that the Commissioner's charges were unconstitutionally motivated, it has never been permitted an opportunity to prove its allegations. That opportunity was denied when the charges were first brought and the District Court dismissed OPUBCO's suit to enjoin any investigation. *OPUBCO, et al.* v. *Powell, et al.*, CIV-74-295-E, U.S. D.C., W.D. Oklahoma. On appeal, No. 74-1676, the Commission argued that OPUBCO was not entitled to be heard on its claims until it was faced with the necessity of having to comply with a subpoena that was administratively final. Although the Court of

Appeals reversed the dismissal and ordered the complaint reinstated, it directed that action thereon be suspended pending completion of certain administrative proceedings. 11a-14a.

The Commission then issued a subpoena, rejected OPUBCO's administrative appeal of it, and sued to enforce it when OPUBCO declined to comply. *EEOC* v. *OPUBCO,* CIV-76-0109-E, *supra.* In rejecting OPUBCO's request to be heard on its defense that the charges were unconstitutionally brought and that any subpoena based upon them should, therefore, not be enforced, the District Court concluded, first, that OPUBCO was entitled to no hearing until the Commission's entire investigation was complete, 18a-19a, and, second, that it need go no further in its consideration of the Commission's authorization to investigate by subpoena than to note that the charges on their face were sufficiently informative so as to activate the investigative process. 20a-22a. In affirming the District Court's enforcement order, the Court of Appeals agreed that no hearing could be had on any of OPUBCO's claims until the Commission's investigation had run its course. 30a-31a. Although *United States* v. *Powell, supra,* was thoroughly briefed and argued, the Court of Appeals' opinion did not mention it.

The thrust of the decision below essentially was that the exhaustion of administrative remedies doctrine precluded judicial intervention at this stage. However, there is no remedy to exhaust. The Commission's present investigation will conclude with a determination on the merits of the charges; it will not resolve OPUBCO's challenge to the motivation for the charges. Even if the Commission were predisposed to rule on OPUBCO's claim, its response



would be foreordained. When OPUBCO initially sought administrative review of the subpoena by the full Commission, the bad faith claims were presented. The Commission's response challenging its motivation was as follows:

> For the Commission to attempt to respond to the instant argument would only serve to give substance to Respondent's erroneous contentions.

Thus, not only is the Commission itself an inappropriate body to consider such a challenge and develop an appropriate record thereon, *Public Utilities Commission* v. *United States,* 356 U.S. 534, 540 (1958); *Barlow's, Inc.* v. *Usery,* 424 F.Supp. 437 (D. Ind. 1976), but *United States* v. *Powell,* 379 U.S. 48 (1964), precludes reliance on the administrative process in the first instance. Any necessary exhaustion of administrative remedies had been accomplished when OPUBCO had administratively appealed the subpoena, had its appeal denied, had refused to comply, and was faced with an enforcement action.

Finally, OPUBCO sought a judicial declaration that any statute was unconstitutional that permitted subpoena enforcement without a hearing on a fairly raised claim that the charges underlying the subpoena were void as improperly motivated. CIV-77-0261B, *aff'd,* No. 77-1531. In affirming a District Court order refusing to consider this contention, the Court of Appeals held:

> The enforcement of the subpoena does not constitute an unreasonable search and seizure. We have made it unmistakably clear that the administrative action must be allowed to run its course before a broad scale constitutional attack may be considered.

37a. Thus, the Court of Appeals has clearly held that, no matter how well raised, any legal or constitutional challenge to the *bona fides* of the Commission's charges and subpoena may not be heard until after a respondent had endured the full play of the administrative process. This, we submit, is inconsistent with decisions of this Court and violates OPUBCO's Fourth Amendment rights.

**A. *United States* v. *Powell*, 379 U.S. 48 (1964), And Other Cases Require That An Evidentiary Hearing Be Held On Such Claims When Fairly Raised By A Subpoena Respondent.**

1. OPUBCO's Claim Was Fairly Raised in The Courts Below

At the time of the several rulings on OPUBCO's demand for a hearing, each of the courts below had substantial and uncontradicted evidence supporting OPUBCO's claim that it was being investigated unconstitutionally. First, the affidavits of OPUBCO's production manager and its counsel alleged that the responsible member of the Commission's Albuquerque District Office threatened that OPUBCO's complaint to congressmen and refusal to settle the *Williams* case would result in those OPUBCO representatives being thrown in jail, that OPUBCO would be "sorry" for its conduct, and that the suit the Commission would file against OPUBCO would cost OPUBCO "seven million dollars" to defend. 40a, 43a. Through the several judicial proceedings over the course of more than four years, the Commission has never produced an affidavit or any other evidence that contradicts these allegations.

Normally, such uncontradicted, serious allegations would require some type of hearing. *United States* v.



*McCarthy*, 514 F.2d 368, 374-75 (3d Cir. 1975); *United States* v. *Roundtree*, 420 F.2d 845, 850-52 (5th Cir. 1969). Moreover, there was substantially more evidence tending to support OPUBCO's claim. To wit: (1) the Commissioner's charges directly followed the EEOC official's threats against OPUBCO and its representatives because of OPUBCO's refusal to settle the *Williams* case on the Commission's terms; (2) the extreme breadth of the charges as to protected classes, discriminatory conduct, and facilities covered constituted a shotgun approach disproportionate to any indication of discrimination that could have appeared to a Commissioner; (3) the answers of the charging Commissioner to OPUBCO's interrogatories filed before OPUBCOs' original complaint, CIV-74-295-E, was dismissed indicated that either she was the willing rubber stamp for someone else or that she personally knew that no reasonable cause existed, contrary to her oath, for believing her charges to be true. When she was asked who had initiated the Commissioner's charge process (Interrogatory 36), what specific evidence of discrimination was known to her (Interrogatory 22), and what was said by any party to any discussion she may have had concerning any alleged discrimination before swearing to her charges (Interrogatories 6(e), 12(d), 15(e)), Commissioner Walsh merely answered "not available." She did not object and refuse to answer, she did not state why the answer was unavailable, she did not say what might enable her to answer, she simply did not answer. Her answers and the oath in support of the charges are inconsistent.

Three other considerations lent credence to OPUBCO's claim and warranted a hearing. As is

now apparent from the admission of one of the Commission's attorneys, the charges arose from the same District Office as employed the person who communicated the threats to the OPUBCO officials. 45a-46a. Second, the Commission to date not only has failed to refute any of the foregoing, it has failed to present any argument on public policy grounds as to why according to OPUBCO an evidentiary hearing would be detrimental to any interest. Lastly, no lower court in any proceeding has determined that OPUBCO has failed adequately to raise its claim that the subpoena and underlying charges were improperly motivated.

2. GIVEN OPUBCO'S SHOWING, *United States* v. *Powell,* 379 U.S. 48 (1964), REQUIRES THAT A HEARING BE HELD.

In *Powell,* this Court considered the claim of a taxpayer that he should not have to submit to a re-examination of his records by an Internal Revenue agent even when the agent's superior had determined that a second examination was necessary and the agent had sworn that fraud was suspected. In ruling that the IRS summons should be enforced, this Court held that the government need show only that the investigation upon which the summons was based would be conducted pursuant to a legitimate purpose. 379 U.S. 48, 57. No greater showing would be required

> unless the taxpayer raises a substantial question that judicial enforcement of the administrative summons would be an abuse use of the court's process.

*Id.* at 51.



Implicit in this holding, however, is the Court's determination that the person responding to the summons would have an opportunity at a hearing to refute the government's "legitimate purpose" showing and establish his challenge on any appropriate ground, including the improper motivation of the government agency in bringing the investigation. *Id.* at 58. Thus, this Court held

> It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.

*Id.*

*Powell* is consistent with and implements this Court's decision in *Reisman* v. *Caplin,* 375 U.S. 440 (1964). In *Reisman,* an Internal Revenue agent sought two taxpayers' records by summons. Rather than await a summons enforcement action by the IRS, counsel for the taxpayers instituted a federal action seeking declaratory and injunctive relief against the investigation. This Court unanimously held that the taxpayers had an adequate remedy at law, *i.e.,* awaiting a summons enforcement hearing at which, in an adversary proceeding, the taxpayers would be able to challenge the summons on any appropriate ground. *Id.* at 443, 446, 449. Included would be the situation where the documents were being sought for an improper purpose. *Id.* at 449.

This is essentially the fact pattern that existed in this litigation. An EEOC investigation had been initiated, document production had been sought, albeit not by subpoena, and OPUBCO had filed a separate action to enjoin the investigation. At most, *Reisman* and *Powell* contemplate that OPUBCO would have to await a subsequent enforcement action of a yet to be issued subpoena before litigating its claim. However, when an enforcement action did follow OPUBCO's refusal to comply with the subsequently issued subpoena, the District Court refused to permit a hearing, 15a-29a, and its decision was affirmed by the Court of Appeals, 30a-31a.

*Powell* and *Reisman* do not stand alone, having been followed by both this Court and the lower federal judiciary. In *Donaldson* v. *United States,* 400 U.S. 517 (1971), the *Reisman* and *Powell* holdings with respect to the right to evidentiary hearings were reaffirmed, *id.* at 526-29, 533. Similarly, in *United States* v. *Bisceglia,* 420 U.S. 141 (1975), this Court noted that administrative investigative power may be abused, as may all power, and recognized that the hearing procedures assured by *Powell* are checks on such abuse. *Id.* at 146.

Most recently, this Court decided two cases in its 1977 Term that reinforced *Powell.* In *United States* v. *LaSalle National Bank,* ——U.S.——, 46 U.S.L.W. 4713 (1978), an IRS summons enforcement case, the Court principally was concerned with the ubiquitous criminal/civil purpose issue attendant upon tax investigations. In the course of considering the effect of an Internal Revenue Agent's motivation, however,



the Court explicitly reaffirmed the *Powell* holding upon which this petition rests:

> We recognize, of course, that examination of agent motive may be necessary to evaluate the good-faith factors of *Powell,* for example, to consider whether a summons was issued to harass a taxpayer.

46 U.S.L.W. 4713, 4718, n.17 (1978).

In *Franks* v. *Delaware,* ——U.S.——, 46 U.S.L.W. 4869 (1978), the Court recognized that it was necessary and appropriate for a criminal defendant to be able to prove at a suppression hearing that the warrant authorizing the contested search was based upon statements that the affiant knew to have been material and false. If critical but false information were to be generated at the initial level leading to the warrant, it inevitably would infect the magistrate's decision. Although OPUBCO has not yet had the opportunity to trace the effects of the EEOC official's threats and motivation through the Commission's hierarchy to Commissioner Walsh, precisely the same considerations apply here as in *Franks.*

Other federal courts have enforced this Court's mandate. In *United States* v. *McCarthy,* 514 F.2d 368 (1975), the Third Circuit, citing *Reisman* and *Powell, id.* at 371-72, ordered a hearing upon the taxpayers' allegations that the Internal Revenue agent conducting the investigation had as his principal a desire to harass the taxpayers and their relatives and associates. *Id.* at 374-75. Similarly, the Fifth Circuit in *United States* v. *Roundtree,* 420 F.2d 845 (1969), re-

affirmed *Powell's* prophylactic function when it held that

> the taxpayer is entitled to investigate the IRS's purpose where such purpose has been put in issue and may affect the legality of the summons.

*Id.* at 851-52. *Accord, EEOC* v. *South Carolina National Bank,* 562 F.2d 329, 332 (4th Cir. 1977). Finally, enforcement was refused an EEOC subpoena, citing *Powell,* when a hearing established that the personal animus of the Commission investigator against the employer's attorneys in another matter was the motivation for the investigation and subpoena. *EEOC* v. *First Alabama Bank of Birmingham,* 440 F.Supp 1381 (N.D. Ala. 1977).

**II. THIS CASE RAISES VITAL QUESTIONS AS TO THE INTERPRETATION OF TITLE VII, THE FOURTH AMENDMENT, AND *MARSHALL* v. *BARLOW'S, INC.*, — U.S. —, 98 S.CT. 1816 (1978), WHICH HAVE NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT**

In *Marshall* v. *Barlow's, Inc.,* —— U.S. ——, 98 S.Ct. 1816 (1978), an employer refused admittance to the nonpublic parts of his business premises to an inspector of the Occupational Safety and Health Administration. The inspector had identified himself and, although he had no reason to believe that he would find a violation of the Occupational Safety and Health Act, 29 U.S.C. § 651, *et seq.,* he sought admission to conduct a routine inspection authorized by Section 8(a) of the Act, 29 U.S.C. § 657(a). Thus, the inspector sought entry to implement OSHA's power of "original inquiry" for the relatively common purpose of satisfying the interest of the agency in determining whether the law might have been violated. Such authority to inquire has been recognized as having been vested in other agencies. *United States* v. *Morton Salt Co.,* 338 U.S. 632, 642-43 (1950) (Federal Trade Commission Act); *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 213, 216 (1946) (Fair Labor Standards Act).



Nevertheless, this Court held that an employer's refusal to admit an inspector for such a purpose required the inspector to obtain a warrant compelling his admission to the premises. Although, the showing required of OSHA before a warrant would be issued would not necessarily have to include probable cause to believe violations of the Act existed, the agency nevertheless would have to demonstrate that its reason for wanting to inspect was proper and consistent with the Act. —— U.S. ——, 98 S.Ct. 1816, 1824-25 (1978). Accordingly, this Court held § 8(a) of the Act to be violative of the Fourth Amendment. *Id.* at 1827. The applicability of this holding to other agencies' enforcement procedures was reserved. *Id.* at 1825.

An equal but perhaps no greater showing should be required of the EEOC when it seeks enforcement of a subpoena issued in aid of its investigation of an employment discrimination charge filed by an individual alleging himself to be the victim of discriminatory action. Section 706(a) of the Act, 42 U.S.C. § 2000e-5(a), requires that the Commission investigate every such charge provided the charge is in writing and under oath. It would not be relevant, absent collusion between the Commission and the individual charging party, that the employer alleges that the charging party maliciously had fabricated his charge; it would be the statutory duty of the Commission

simply to ascertain its validity by subpoena or otherwise. Accordingly, the *Barlow's* showing required of the Commission at the subpoena enforcement hearing need be no greater than proof that a written, sworn charge was filed which on its face alleged a violation of the Act.

A commissioner's charge is entirely a different matter. Commissioner Walsh swore that she had "reasonable cause" to believe that OPUBCO was violating the Act. Any subsequent Commission investigation necessarily is based upon this "reasonable cause" allegation. Accordingly, it is not the same as investigations conducted by OSHA, the FTC, or the IRS which are agencies empowered to investigate at random simply to assure themselves that violations have not occurred.

Nor is the authority for the investigation the same as that which authorizes an investigation of a charge of an individual. In the case of the individual, the charge itself is all that is necessary. With a Commissioner's charge, on the other hand, the charge is internally generated. As here, she has sworn that reasonable cause exists to believe her charges are true. This reasonable cause, therefore, is the foundation for her charges and the subpoenas are based thereon. Reasonable cause is not made of whole cloth; it must consist of facts ascertained at some level by the Commission. As the "general administrative plan for enforcement" would serve in *Barlow's,* so these facts, or those showing violations of the Act, constituting reasonable cause herein would be the affirmative showing required of the Commission when it seeks enforcement of its subpoena. Although such a showing would not be difficult if facts actually existed, the



Commission not only did not make this showing, it made no showing whatsoever. The Commission did not call a single witness or offer a single affidavit establishing that the subpoena and Commissioner Walsh's charges had a proper purpose as indicated on the face of the charges.

The courts below made it abundantly clear, not only that no *Powell* hearing would be permitted, but that any subpoena seeking data bearing some relationship to minimally specific charges would be enforced without more. Although OPUBCO does not believe that Congress so intended, if such a showing is all that the Act requires, the inspection provisions of Title VII are void as violative of the Fourth Amendment. *Marshall* v. *Barlow's Inc., supra.* As this court noted in *See* v. *City of Seattle,* 387 U.S. 541, 544-45 (1967):

> Warrants are a necessary and tolerable limitation on the right to enter and inspect commercial premises.
>
> * * *
>
> Given the analogous investigative function performed by the administrative subpoena and the demand for entry, we find untenable the proposition that the subpoena, which has been termed a "constructive" search . . . is subject to Fourth Amendment limitations which do not apply at commercial premises.

### III. THERE ARE NO POLICY CONSIDERATIONS WHICH MILITATE AGAINST ACCORDING A SUBPOENA RESPONDENT A HEARING IN THE PRESENT CIRCUMSTANCE

While not attempting to set up a sequence of straw men, it is nevertheless appropriate to consider several factors that are not present in this case. First, OPUBCO does not seek to circumvent the ad-

ministrative process; rather it is asserting rights it has within it. No attempt is being made to litigate prematurely or in an inappropriate forum whether the Commissioner's charges are true or erroneous. OPUBCO only wants to litigate "whether it is constitutional to fasten the administrative procedure onto" OPUBCO. *Public Utilities Commission* v. *United States,* 356 U.S. 534, 540 (1958).

Second there need be little fear that requiring the Commission to make a *Barlow's* showing and/or according a respondent a *Powell* hearing on its claims will consume the Commission's enforcement energies beyond manageable proportions. See *Marshall* v. *Barlow's Inc.,* —— U.S. ——, 98 S.Ct 1816, 1822-23. Most document requests, whether by subpoena or otherwise, are complied with without the need to resort to the enforcement process and, as noted above, both *Barlow's* and *Powell* hearings could be extensive only where Commissioner's charges and substantial allegations of bad faith are present. There are no empirical data indicating this situation commonly will arise.[5]

Third, there is no reason to fear that subpoena respondents will abuse their right to an adversary, evidentiary hearing with or without attendant discovery. Discovery, extensive or otherwise, need be granted only as the need for it appears, *United States* v. *Satter,* 432 F.2d 697, 700-01 (1st Cir. 1970); *United States* v. *McCarthy,* 514 F.2d 368, 373 (5th Cir. 1975); Rule 81(a)(3), Federal Rules of Civil Procedure, and courts have proved themselves capable of

[5] *E.g.,* for fiscal year 1975, only 39 pattern-or-practice charges were filed as compared to 71,023 charges which were received during the same period. EEOC 10th Annual Report, pp. 10, 34.



preventing discovery abuses. In any event, if discovery may be the only way of ferreting out the necessary evidence, see *EEOC* v. *First Alabama Bank of Birgingham,* 440 F.Supp. 1381 (N.D. Ala. 1977), it would be anomalous to impose upon the respondent the burden of proving the agency's improper purpose, *United States* v. *Powell,* 379 U.S. at 58, while denying it the tools necessary to the discharge of that burden.

Lastly, this is not a case where the subpoena respondent, by its objections, is attempting to avoid the onus of an administrative investigation or even the effects of the peculiar personal animus of Commission employees. This is a case in which OPUBCO has alleged and more than fairly raised the claim that it is being punished because of its exercise of its First Amendment right to complain to Congress about the conduct of a federal agency. In varying contexts, this Court has stated in straightforward terms that such an exercise of constitutional rights may not be punished. *Bond* v. *Floyd,* 385 U.S. 116, 136 (1936); *Rosenblatt* v. *Baer,* 383 U.S. 75, 85 (1966); see *In re Quarles and Butler,* 158 U.S. 532, 535 (1895). Accordingly, it is all the most important that this petition be granted so that OPUBCO may vindicate its rights under the First Amendment as well as those under the Fourth and Fifth Amendments.

## CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgments and opinions of the Court of Appeals.

Respectfully submitted,

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# APPENDIX

## APPENDIX

### TITLE VII, CIVIL RIGHTS ACT OF 1964.

**42 U.S.C. § 2000e-5, Pub.L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259; Pub.L. 92-261, § 4, Mar. 24, 1972, 86 Stat. 104**

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to

believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time



such statement is sent by registered mail to the appropriate state or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Com-



mission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful

employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative



action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

*Provisions of sections 101 to 115 of Title 29 not applicable to civil actions for prevention of unlawful practices*

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

*Proceedings by Commission to compel compliance with judicial orders*

(i) In any case in which an employer, employment agency or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

*Appeals*

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

*Attorney's fee; liability of Commission and United States for costs*

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

**42 U.S.C. § 2000e-8(a), Pub.L. 88-352, Title VII, § 709, July 2, 1964, 78 Stat. 262**

(a) In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

**42 U.S.C. § 2000e-9, Pub.L. 88-352, Title VII, § 710, July 2, 1964, 78 Stat. 264**

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply.

**29 U.S.C. § 161 (1-2), July 5, 1935, 49 Stat. 455; June 25, 1936, 49 Stat. 1921; June 23, 1947, 61 Stat. 150**

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evi-



dence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence, if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

THE CONSTITUTION OF THE UNITED STATES

*Amendment I*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*Amendment IV*

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Amendment V*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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No. 74-1676

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THE OKLAHOMA PUBLISHING COMPANY, individually, and on behalf of its OKLAHOMA GRAPHICS and NATIONAL PACKAGING DIVISIONS, and WKY TELEVISION SYSTEM, INC. (a wholly owned subsidiary of The Oklahoma Publishing Company), MISTLETOE EXPRESS SERVICE (a wholly owned subsidiary of The Oklahoma Publishing Company), *Appellants,*

v.

JOHN H. POWELL, Chairman; LUTHER HOLCOMB, Vice Chairman; COLSTON A. LEWIS, ETHEL BENT WALSH, and RAYMOND L. TELLES, Commissioners, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; LORENZO RAMIREZ, DIRECTOR, REGION VI, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and TOM ROBLES, DIRECTOR, ALBUQUERQUE DISTRICT, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Appellees.*

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**Appeal From The United States District Court**
**For The Western District of Oklahoma**
**(D.C. # 74-295-E)**

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Before HILL, SETH and HOLLOWAY, Circuit Judges.

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PER CURIAM.

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The Oklahoma Publishing Company and its named divisions and subsidiaries sued the commissioners and other officers of the Equal Employment Opportunity Commission for declaratory and injunctive relief, as well as mandamus and money damages.

The essence of the complaint is that defendants filed a charge against plaintiffs and conducted an investigation asserted to be in violation of the statutory procedures and authority contained in 42 U.S.C. § 2000e, and 29 C.F.R. § 1601 et seq., and also in violation of plaintiffs' First Amendment right to petition Congress for redress of grievances, Fifth Amendment right to due process, and Ninth Amendment Freedom from harassment for exercise of such rights.

Jurisdiction was alleged under 42 U.S.C. § 2000e (Title VII of the 1964 Civil Rights Act), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (mandamus), 28 U.S.C. § 2201 (declaratory judgments), and the First, Fifth, and Ninth Amendments.

At a hearing on defendants' motion to dismiss for lack of jurisdiction, the trial court concluded that the doctrine of sovereign immunity applied and that the action was premature. It thus granted the motion. The trial judge's oral opinion considered such other issues as ripeness and exhaustion of administrative remedies in light of the fact that the Equal Employment Opportunity Commission had neither issued a subpoena nor filed an action against plaintiffs in court.

Plaintiffs appeal, briefing the issues of sovereign immunity, prematurity and exhaustion, and the propriety of dismissal as opposed to stay pending exhaustion. Plaintiffs also cover in great detail wherein the procedure was defective and that the charges were not specific enough.



The complaint alleges defendants have acted and are acting "in excess of their official capacities as officers, agents or members of said Commission, under 42 U.S.C. § 2000e-4, 5." Specifically it is alleged that the charges filed by defendant Walsh on October 16, 1973, violated 42 U.S.C. § 2000e-5, and 29 C.F.R. § 1601 et seq., in that they were untimely served, unsworn, not deferred to the Oklahoma Human Rights Commission, and they failed to set forth the name, place, and other circumstances of the alleged unlawful employment practice. Furthermore, the complaint alleged these charges were vindictively retaliatory, in violation of plaintiffs' constitutional rights as well as in excess of statutory authority.

The allegations in the complaint are thus a mixture of assertions relating to constitutional rights, of procedural inadequacies in the administrative proceedings, and of vagueness of the charges. The assertions as to procedural matters and vagueness will not be considered as they cannot constitute a cause of action as now urged. With such a combination of issues asserted by plaintiffs, the complaint at this stage must be viewed as an attempt to divert, forestall, or anticipate administrative proceedings. This cannot be done as the administrative action must be allowed to run its course before such a broad-scale attack can be considered. Ewing v. Mytinger & Casselberry, 339 U.S. 594; Abbott Laboratories v. Gardner, 387 U.S. 136; McDonnell Douglas Corp. v. Green, 411 U.S. 792. Since the administrative steps must be allowed to go forward, this action is premature in seeking to correct procedural steps, and to develop facts and issues which are also within the scope of the administrative proceedings.

We take the dismissal by the trial court to be on the basis that the suit was prematurely commenced. However, the outright dismissal of the complaint was not the solution for the problem. The agency should be permitted to

proceed with the administrative action, if it is disposed to do so, and to act with diligence, but the order of dismissal is set aside and the complaint and the action are to be reinstated in the trial court and proceedings thereon suspended until the completion of administrative action by the Equal Employment Opportunity Commission. The trial court on remand shall fix what it considers to be a reasonable time for completion of such action, and at the conclusion of that period of time (or after such modifications thereof as it deems to be warranted from time to time), this action shall be set down for further proceedings in the regular course of business of the court.

We, of course, express no opinion on the issues raised by the plaintiff nor on the defenses.

It is so ordered.



IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

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No. CIV-74-295-E
(Consolidated)
No. CIV-76-0109-E

---

THE OKLAHOMA PUBLISHING COMPANY, individually, and on behalf of its OKLAHOMA GRAPHICS and NATIONAL PACKAGING DIVISIONS, and WKY TELEVISION SYSTEM, INC. (a wholly owned subsidiary of THE OKLAHOMA PUBLISHING COMPANY), MISTLETOE EXPRESS SERVICE (a wholly owned subsidiary of THE OKLHAOMA PUBLISHING COMPANY), *Plaintiffs,*

vs.

JOHN H. POWELL, Chairman; LUTHER HOLCOMB, Vice-Chairman; COLSTON A. LEWIS, ETHEL BENT WALSH, and RAYMOND L. TELLES, Commissioners, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and TOM ROBLES, Director, Albuquerque District, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Defendants.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Petitioner,*

vs.

THE OKLAHOMA PUBLISHING COMPANY, individually and its COLORGRAPHICS, and NATIONAL PACKAGING; and WKY TELEVISION SYSTEM, INC., and MISTLETOE EXPRESS SERVICE, wholly owned subsidiaries of THE OKLAHOMA PUBLISHING COMPANY, *Respondents.*

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**Memorandum Opinion and Order**

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Before LUTHER B. EUBANKS, United States District Judge.

These cases have been consolidated for administrative convenience, but they are distinct actions. That distinctiveness is not without significant difference, and accordingly, their histories are given below for the purpose of clarification. To simplify discussion, all plaintiffs-respondents are referred to hereinafter as OPUBCO and all defendants and petitioner as EEOC.

In October of 1973, a Commissioner's charge was filed against OPUBCO, alleging that OPUBCO discriminates against Negroes, American Indians, Spanish-surnamed Americans and females on the basis of race, national origin and sex with respect to hiring, job assignments, promotions, training and other terms and conditions of employment.

On March 21, 1974, OPUBCO filed action # CIV-74-295-E in this court, stating in the complaint that the purpose of the suit was to "resist the investigation of said charges by the EEOC on the grounds that such investigation is contrary to law," and seeking preliminary and permanent injunctions.

On July 26, 1974, the court granted EEOC's motion to dismiss the complaint and subsequently entered order dismissing the cause of action. Appeal was taken.

On September 4, 1975, the Court of Appeals reversed the order of dismissal and remanded, with the direction that the action was to lay dormant pending completion of administrative proceedings. The unpublished opinion reads in pertinent part:

> "The allegations in the complaint are a mixture of assertions relating to constitutional rights, of procedural inadequacies in the administrative proceedings, and of vagueness of the charges. The assertions as to procedural matters and vagueness will not be considered as they cannot constitute a cause of action as now urged. With such a combination of issues asserted by plaintiffs, the complaint at this stage must



> be viewed as an attempt to divert, forestall, or anticipate administrative proceedings. This cannot be done as the administrative action must be allowed to run its course before such a broad-scale attack can be considered. . . . Since the administrative steps must be allowed to go forward, this action is premature in seeking to correct procedural steps, and to develop facts and issues which are also within the scope of the administrative proceedings.
>
> ". . . The agency should be permitted to proceed with the administrative action . . . but the order of dismissal is set aside and the complaint and the action are to be reinstated in the trial court and proceedings thereon suspended until the completion of administrative action by the EEOC. The trial court on remand shall fix what it considers to be a reasonable time for completion of such action. . . ."

In the interim (on August 1, 1974), an amended commissioner's charge had been filed against OPUBCO, and to further investigation of that charge, on October 20, 1975, a subpoena duces tecum was issued and served upon OPUBCO requesting the production of certain documents, records and data.

OPUBCO petitioned the Commission for revocation of the subpoena. On December 5, 1975, the Commission issued its determination that the subpoena would not be revoked. OPUBCO has refused to comply with the subpoena in any respect.

On February 2, 1976, the EEOC filed action # CIV-76-0109-E, an application for Order to Show Cause why the subpoena should not be enforced. EEOC moves for judgment pursuant to Rule 81(a)(3) or in the alternative for summary judgment. OPUBCO opposes the motion on grounds similar to those which were asserted in support of its claim. The issues have been briefed by both parties, and the matter is ripe for consideration.

I. THE ONLY ISSUES WHICH THIS COURT MAY AND NEED DETERMINE ARE THOSE HAVING REFERENCE TO # CIV-76-0109-E.

A. *OPUBCO's Claims Are Still Premature and # CIV-74-295-E Will Continue to Be Held in Suspension.*

OPUBCO urges that this court understand the term "administrative action" as used in the Court of Appeals' Opinion to mean no more than the issuance of a subpoena.

The Opinion does not want clarity and this court will not, under the guise of interpretation, obscure its plain meaning. Proceedings on # CIV-74-295-E are suspended until all "administrative steps" have been taken and the administrative action has "run its course."[1]

#CIV-74-295-E shall ripen at such time as the administrative steps of investigation and persuasion (if the EEOC is disposed to undertake conciliation) are completed, or at such time as it may be shown that the EEOC has failed to exercise diligence to complete its action within a reasonable period.

B. *OPUBCO's Claims Are Not Ripened by Virtue of Their Transformation Into Defenses to # CIV-76-0109-E.*

OPUBCO contends that it is entitled to present to this court, prior to any enforcement of any *subpoena*, all defenses to the validity of the EEOC *charge*.

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[1] However, the court can properly entertain one pending motion having reference to #CIV-74-295-E, to wit, the EEOC's motion to add a party and change a party's name by interlineation. The court would not be authorized to rule on a motion to add a party but the motion is mistitled and in effect seeks two name changes by interlineation: WKY has become Gaylord Broadcasting Company and Colorgraphics has become Oklahoma Graphics. Motion granted, name change by interlineation to be made in #CIV-76-0109-E also.



This court does not agree. To allow OPUBCO to "divert, forestall or anticipate" by way of defense the administrative action which it may not offensively frustrate is to permit circumvention of the clear mandate governing this case.

Furthermore, such allowance would contravene all pertinent judicial developments establishing that the proper scope of judicial inquiry in a summary proceeding such as this does not reach to the validity of the *charge*, or the merits of the defenses against it. *Pacific Maritime Association* v. *Quinn, Reg'l Dir. EEOC*, et al., 491 F.2d 1294 (9th Cir. 1974); *Graniteville Company* v. *EEOC*, 438 F.2d 32 (4th Cir. 1971); *Manpower, Inc.* v. *EEOC*, 346 F.Supp. 126 (E.D. Wis. 1972); *H. Kessler & Co.* v. *EEOC*, 53 F.R.D. 330 (N.D. Ga. 1971), aff'd 468 F.2d 25 (5th Cir. 1972), modified en banc on a ground not at issue herein, 472 F.2d 1147 (1973), cert. denied, 412 U.S. 939 (1973); *Cameron Iron Works, Inc.* v. *EEOC*, 320 F.Supp. 1191 (S.D. Tex. 1970).

II. JUDICIAL INQUIRY IN THIS ENFORCEMENT PROCEEDING IS LIMITED TO DETERMINATION OF WHETHER (1) THE INVESTIGATION IS WITHIN THE AUTHORITY OF THE EEOC; (2) THE DEMAND IS NOT TOO INDEFINITE; AND (3) THE INFORMATION SOUGHT IS REASONABLY RELEVANT. *EEOC* v. *University of N.M., Albuquerque*, 504 F.2d 1296, 1302 (10th Cir. 1974).

For purposes of convenience and clarity only, disposition is by separate reference to each objection raised. No inference should arise therefrom that the burden of persuasion has been shifted to OPUBCO. The burden of establishing the enforceability of this subpoena, and its enforceability as is, rests of course upon the EEOC.

Certain issues are, on the basis of the present record, appropriately resolved summarily. Others, as noted, require further exposition by way of supplemental briefing.

A. *Authorization.*

One defense asserted in support of OPUBCO's contention that the charge is invalid should be given passing reference as an alternative defense that the subpoena is unenforceable—to wit, that the charge is too sketchy to comply with Title VII's requirement that supporting facts be set forth.

The amended charge reads in toto:

> "Pursuant to Section 706(a) of Title VII of the Civil Rights Act of 1964, as amended, on October 16, 1973, I charged the following employer with unlawful employment practices:
>
> The Oklahoma Publishing Company
> Oklahoma City, Oklahoma
>
> and its facilities:
>
> Colorgraphics
> Oklahoma City, Oklahoma
>
> National Packaging
> Oklahoma City, Oklahoma
>
> WKY Television System Inc.
> Oklahoma City, Oklahoma
>
> Mistletoe Express Service
> Oklahoma City, Oklahoma
>
> Since October 16, 1973, I have had and continue to have reasonable cause to believe that the above employer was and continues to be within the jurisdiction of the Equal Employment Opportunity Commission and has violated and continues to violate Sections 703(a) and (d) of the Civil Rights Act of 1964, as amended, by discriminating against Negroes, American Indians, Spanish surnamed Americans, and females on the basis of race, national origin, and sex with respect to hiring, job assignments, promotions,



> training and other terms and conditions of employment.
>
> 1. Respondent employer discriminatorily fails or refuses to hire Negroes, American Indians, Spanish surnamed Americans, and females in the same manner it hires Caucasians and males because of their race, national origin and sex.
> 2. Respondent employer discriminatorily assigns Negroes, American Indians, Spanish surnamed Americans, and females to traditionally relegated or lower-paying jobs, thus depriving them of an equal opportunity for promotions.
> 3. Respondent employer discriminatorily fails to provide equal training opportunities to Negroes, American Indians, Spanish surnamed Americans, and females as it provides Anglos and males.
> 4. Respondent employer has further discriminated against Negroes, American Indians, Spanish surnamed Americans, and females in all policies and practices like, related to, or growing out of the specific practices enumerated above.
>
> The classes aggrieved include, but are not limited to, all persons who have been and continue to be adversely affected by the unlawful practices complained of herein."

The law in this circuit is settled. Such a charge is sufficient to activate the investigatory process. *U. S. Steel Corp.* v. *United States,* 477 F.2d 925 (10th Cir. 1973); *Mountain States T. & T. Co.* v. *EEOC,* 466 F.2d 541 (10th Cir. 1972); *Sparton Southwest, Inc.* v. *EEOC,* 461 F.2d 1055 (10th Cir. 1971, on rehearing en banc, 1972).

The remainder of OPUBCO's objections are deemed by the court to go not to the question of authority, but to

questions of relevancy, vagueness and burdensomeness. Accordingly, the court determines that all undisputed material facts establish that the subpoena was issued pursuant to an investigation within the EEOC's authority, and the court further determines as a matter of law that the subpoena is enforceable.[2]

There remains only the question of whether the subpoena is enforceable as is, or whether modification is necessary.

B. *Comparative Data.*

As can be ascertained from the above, the charge identifies OPUBCO and its facilities by Oklahoma City ad-

[2] The fact that OPUBCO's interrogatories purposed to discover who initiated and prepared the *charges* and statements made by such persons are as yet unanswered does not compel a different result. The information is sought to support OPUBCO's allegations of an EEOC vendetta. "[T]he court is not required to apply the rules of discovery in demand enforcement proceedings, e.g., Rule 81(a)(3) Fed.R.Civ.P., but may allow discovery where it is necessary to provide a meaningful adversary hearing of legitimate challenges" *H. Kessler & Co., supra* at 339.

A court must not close its eyes to a challenge of EEOC's good faith. But at this stage good faith is a question of authorization, not motivation to initiate investigatory proceedings.

Finally, it should be noted that OPUBCO advises "their discovery will not be complete even after they obtain proper answers to their interrogatories." OPUBCO intends to schedule several depositions and subpoena documents "relevant to the issues at trial."

This court will adhere strictly to the principle that the employer has the same discovery rights as the EEOC. But it is not an abuse of process within the context of this abbreviated proceeding to disallow delay after delay while OPUBCO piles discovery upon discovery, seeking materials which may be relevant to the development of issues properly raised at some future trial, but have no bearing on legitimate challenges to enforcement of the subpoena. *Wurlitzer Co. (Holly Sp. Div.)* v. *EEOC,* 50 F.R.D. 421 (N.D. Miss. 1970).



dresses. The subpoena identifies OPUBCO and its facilities without such limiting reference.

OPUBCO contends that by this subpoena the EEOC is attempting to gather data on facilities located from New Mexico to Florida, and that data on such other facilities is irrelevant, since all personnel decisions are made locally.

EEOC's abbreviated response to this objection indicates only that it should be permitted to elicit comparative data.

This court is of the view that while relevancy is a term of broad and flexible application, what is "comparatively relevant" is not inherently incapable of confinement, but indeed must have definitional context. This court adopts the definitional context of the EEOC's charge, and accordingly modifies this subpoena to confine the request for comparative data to data having reference to:

The Oklahoma Publishing Company
Oklahoma City, Oklahoma

and its facilities:

Colorgraphics
Oklahoma City, Oklahoma

National Packaging
Oklahoma City, Oklahoma

WKY Television System, Inc.
Oklahoma City, Oklahoma

Mistletoe Express Service
Oklahoma City, Oklahoma

In the absence of even a suggestion by EEOC that there are interstate company-wide personnel policies, the above modification is in keeping with *Joslin Dry Goods Co.* v. *EEOC,* 483 F.2d 178 (10th Cir. 1973).

*C. Compilation of Data by OPUBCO.*

OPUBCO prays the court quash Items numbered 1-23 to the extent they require OPUBCO to make compilations of data, specifically: names of all applicants, persons hired, trained and/or promoted in 1973, their race, sex and national origin, job classifications and rate of pay, and date hired and fired, if fired, and if fired, why.

OPUBCO argues that such compilations cannot be required, and cites this court to several opinions offered in support of that position.

EEOC responds that it may require an employer to make compilations, and cites its supporting cases.

This court does not believe it is obliged to choose one of two extremes. *Joslin Dry Goods, supra,* has not settled the question, because the Court of Appeals did not, as OPUBCO urges, "affirm" the holding of the district court that the employer cannot be required to compile information. A normal reading of that opinion reveals that the question was not before the court. ("[EEOC] does not question the district court's holding with respect to the compilation of information." At 183.)

Other Courts of Appeals have held that there is "nothing unique" about a requirement that the employer make certain compilations. *Motorola, Inc.* v. *McLain,* 484 F.2d 1339, 1346 (7th Cir. 1973), cert. denied, 416 U.S. 936 (1974); *Local No. 104, Sh. Met. Wkrs. Int. Ass'n.* v. *EEOC,* 439 F.2d 237 (9th Cir. 1971).[3] A subpoena is not

[3] OPUBCO relies, inter alia, upon *EEOC* v. *Quick Shop Mkts., Inc.*, 396 F.Supp. 133 (1975), enforcement of subpoena affirmed 526 F.2d 802 (8th Cir. 1975). In fact, the question of who was to undertake the compiling of data was not before the Court of Appeals, nor apparently was it even before the district court. The EEOC therein sought only to examine records, and accordingly the court's parenthetical remark that that is all it is entitled to do was dictum. At 137.



subject to quashing because it requires compilation by the employer, but it may be subject to modification, or conditions. *New Orleans Public Service, Inc.* v. *Brown,* 507 F.2d 160 (5th Cir. 1975).

This court is of the opinion that underlying the determination of whether compilation will, or will not, be required, should be consideration of the burden involved. It may be unduly burdensome to require compilation of summaries of data necessitating research and preparation; it may not be unduly burdensome to require compilation of lists from existing computer data, or otherwise readily accessible documentation. See *H. Kessler & Co., supra,* and *Cameron Iron Works, Inc., supra.*

There is a suggestion that such an approach is appropriate in *Rich* v. *Martin Marietta Corp.,* 522 F.2d 333 (10th Cir. 1975):

> "We think it is plain, therefore, that the plaintiffs had a right to the information and statistics from which they could have compiled trends and policies on the numbers of white persons receiving promotions during the relevant time periods in the departments and throughout the plant. . . .
>
> • • •
>
> "In all likelihood the defendant already has the figures isolated and computed. If not, it ought to proceed forthwith compiling them or at least compiling information from which the plaintiffs can prepare their evidentiary tables or statistics." At 345.

While *Rich* involved problems arising out of the use of interrogatories, the determinative question is not the discovery vehicle used by the EEOC, but the burden sought to be imposed upon OPUBCO.

Inasmuch as this approach is not one contemplated by either party, the court is without guidance as to the ques-

tion of burdensomeness. Perhaps, however, supplemental briefing and further order of this court will not be required. Hopefully, "hard-line postures" will be moderated and an attempt to resolve differences will be "pursued in a cooperative spirit by all concerned." *EEOC* v. *Western Pub. Co., Inc.,* 502 F.2d 599, 603-604 (8th Cir. 1974). The court will thus again inject itself into this aspect of the dispute only if notified by the parties that despite a bona fide effort they are unable to agree as to what information can be readily compiled by OPUBCO, and what information should be compiled by the EEOC from data copied.

D. *Copying.*

OPUBCO contends that the EEOC cannot require it to furnish copies of documents.

42 U.S.C. § 2000e-8(a) reads in pertinent part: ". . . the Commission shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated . . . ." Prior to amendment in 1972, § 2000e-9 read: ". . . the Commission shall have authority . . . to require the production of documentary evidence." It now reads:

> "For the purpose of all hearings and investigations conducted by the Commission . . . section 11 of the National Labor Relations Act (49 Stat. 455; 29 USC 161 [29 USC § 161] shall apply."

That section provides right of access and copying.

Accordingly, the subpoena to the extent that it seeks copies to be supplied by OPUBCO is modified and is enforceable only to the extent access to and the right to copy evidence is sought.

E. *Unwritten Policies.*

Apparently, this objection relates to the second portion of Item # 16, having reference to promotion policies and



information pertaining to the same if they have not been reduced to writing.

This court is of the opinion that a subpoena duces tecum cannot reach to an intangible.

However, the court has not been enlightened as to the extent to which promotion policies are, or are not, documented. If there are in fact written policies, discussion concerning this item could only be academic. Accordingly, the court must await supplemental briefing.

F. *Vagueness.*

OPUBCO objects to Item # 7 and Item # 21 in the particulars supplied emphasis by the court:

> "7. Explain how you most commonly recruit applicants and have done so during 1973. This will include such things as chance walk-ins, employee referral, use of private employment agencies, use of the state employment commission, use of advertising in local newspapers, use of trade papers, recruiting at colleges and trade schools, 'image' advertising by contacts with schools on 'career' days, use of union hiring halls, use of temporary help companies, and so forth. Indicate the relative importance of the various methods which you may use in terms of numbers of persons recruited. When appropriate, give the names of the newspapers, employment agencies, unions, *and so forth.*
>
> "21. Please detail the companies' policies on training. Include types of training programs which are available, how these opportunities are made known to employees, how persons are selected for training, *etc.*"

The subpoena should be restructured to excise "and so forth," "etc." or to specify what is sought.

G. *Affirmative Action.*

OPUBCO contends EEOC is not entitled to a copy of its affirmative action program because that program is irrelevant to the charge, and is furthermore privileged information.

Another court has concluded that such a program is at least peripherally relevant to the charge. *EEOC* v. *Quick Shop Mkts., Inc.,* 396 F.Supp. 133 (E.D. Mo. 1975), affirmed 526 F.2d 802. To the extent any "information sought is confidential, it must be treated as such in the course of the investigation." *EEOC* v. *University of N.M., supra* at 1304.

Supplemental briefs on the questions of unwritten policies and of compilations are to be filed simultaneously June 7, 1976. This expansive period of time is given to enable the parties in the interim to attempt resolution of their differences amicably, without further order of the court. The parties are to notify the court if and when at any time prior to June 7, they agree supplemental briefing will not be necessary, in which case this Order will become final.

If supplemental briefs are filed, within five (5) days of receipt the parties are to notify the court if they desire to reply.

IT IS SO ORDERED.

The Clerk of the Court is directed to mail a copy hereof to counsel of record.

DATED this 11th day of May, 1976.

/s/ LUTHER B. EUBANKS
*United States District Judge*



[Caption omited in printing]

**Order**

Supplemental memorandums and replies thereto, by which media the parties have agreed that OPUBCO will make available any and all information which presently exists and is not otherwise privileged and EEOC will make its own investigation, have mooted the necessity for any determination of this court supplemental to the Order of May 11, 1976, and accordingly that Order is now deemed final.

The court must decline EEOC's prayer that it determine at the outset that the data sought is not privileged, for the reasons that in the absence of a refusal to produce on that ground, the issue is prematurely raised.

OPUBCO's prayer for award of attorney's fees and costs is denied. Even assuming, arguendo, OPUBCO is the prevailing party, the court would be guided by the principle that out of respect for "the entire legislative scheme," "discretion should be sparingly exercised" in granting such a prayer. *Carrion* v. *Yeshiva University,* 397 F.Supp. 852 (S.D. N.Y. 1975). This case presents no occasion for the exercise of such discretion.

IT IS SO ORDERED.

The Clerk of the Court is directed to mail a copy hereof to counsel of record.

DATED this day of June, 1976.

/s/
*United States District Judge*

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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No. 76-1625

---

THE OKLAHOMA PUBLISHING COMPANY, individually, and on behalf of its OKLAHOMA GRAPHICS and NATIONAL PACKAGING DIVISIONS, and GAYLORD BROADCASTING COMPANY (a wholly owned subsidiary of The Oklahoma Publishing Company), and MISTLETOE EXPRESS SERVICE (a wholly owned subsidiary of The Oklahoma Publishing Company), *Appellants,*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

and

JOHN H. POWELL, Chairman; LUTHER HOLCOMB, Vice-Chairman; COLSTON A. LEWIS, ETHEL BENT WALSH, and RAYMOND L. TELLES, Commissioners, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TOM ROBLES, Director, Albuquerque District, Equal Employment Opportunity Commission, *Appellees.*

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**Appeal From The United States District Court**
**For The Western District of Oklahoma**
**(D.C. # # 74-295-E, 76-0109-E)**

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Before SETH, Chief Judge, DOYLE, Circuit Judge, and STANLEY, Senior District Judge*.

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* Of the District of Kansas, sitting by designation.



PER CURIAM.

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This is part of an ongoing Equal Employment Opportunity Commission proceeding commenced by the filing of Commissioner's Charge against the Oklahoma Publishing Company and several subsidiaries. The EEOC began an investigation of the charge. In our opinion of September 5, 1975, we said:

> ". . . With such a combination of issues asserted by plaintiffs, the complaint at this stage must be viewed as an attempt to divert, forestall, or anticipate administrative proceedings.
>
> "This cannot be done as the administrative action must be allowed to run its course before such a broad-scale attack can be considered. *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594; *Abbott Laboratories* v. *Gardner,* 387 U.S. 136; *McDonnell Douglas Corp* v. *Green,* 411 U.S. 792. Since the administrative steps must be allowed to go forward, this action is premature in seeking to correct procedural steps, and to develop facts and issues which are also within the scope of the administrative proceedings."

The district court in accordance with our opinion directed the action to proceed. A subpoena duces tecum was issued by the Commission; the trial court modified it in some respects when it was challenged by the company. The company refused to comply, and an application for enforcement was filed with the district court. The court ordered enforcement and we affirm. The subpoena is clearly part of the administrative proceedings referred to in our previous opinion which must be allowed to go forward as therein ordered.

AFFIRMED.

No. 76-1625

THE OKLAHOMA PUBLISHING COMPANY, individually, and on behalf of its OKLAHOMA GRAPHICS and NATIONAL PACKAGING DIVISIONS; and GAYLORD BROADCASTING COMPANY (a wholly owned subsidiary of The Oklahoma Publishing Company); MISTLETOE EXPRESS SERVICE (a wholly owned subsidiary of The Oklahoma Publishing Company), *Plaintiffs-Appellants,*

vs.

JOHN H. POWELL, Chairman; LUTHER HOLCOMB, Vice-Chairman; COLSTON A. LEWIS, ETHEL BENT WALSH, and RAYMOND L. TELLES, Commissioners, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; LORENZO RAMIREZ, Director, Region VI, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; and TOM ROBLES, Director, Albuquerque District, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Defendant-Appellees.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Petitioner-Appellee,*

vs.

THE OKLAHOMA PUBLISHING COMPANY, individually and its OKLAHOMA GRAPHICS, and NATIONAL PACKAGING, and GAYLORD BROADCASTING COMPANY and MISTLETOE EXPRESS SERVICE, wholly owned subsidiaries of The Oklahoma Publishing Company, *Respondents-Appellants.*

MARCH TERM—April 6, 1978

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges, and Honorable Arthur J. Stanley, Jr., Senior District Judge.



This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by appellants in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Seth and Doyle and Senior District Judge Stanley to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ HOWARD K. PHILLIPS, *Clerk*
HOWARD K. PHILLIPS

A true copy

Teste

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

By

/s/
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

---

No. Civ. 77-0261-B

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THE OKLAHOMA PUBLISHING COMPANY, ETC., *et al.*,
*Plaintiffs,*

VS.

ETHEL BENT WALSH, ACTING CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*, and LUTHER B. EUBANKS, JUDGE U.S. DISTRICT COURT, WESTERN DISTRICT OF OKLAHOMA,
*Defendants.*

**Order**

Upon consideration of Defendant Equal Employment Opportunity Commission's Motion To Strike, the memorandum and oral arguments in support thereof, and the opposition thereto, it is by the Court this 4 day of May 1977,

Ordered that said Defendant's Motion To Strike and the same is hereby granted as to all party-defendants, namely Walsh, Leach, and Lewis of the Equal Employment Opportunity Commission and Judge Luther B. Eubanks of the United States District Court for the Western District of Oklahoma, and the above entitled action is hereby stricken as to all party-defendants with prejudice, pursuant to Rules 11 and 12(f) of the Federal Rules of Civil Procedure, upon finding of the Court that Plaintiffs' complaint and pleadings, viewed in the context of prior and simultaneous proceedings between these parties in Civ-74-295-E and Civ-76-0109-E, are sham, frivolous, vexations and filed in bad faith as a dilatory tactic for the sole purpose of further delaying or impeding the administrative process of the United States Equal Employment Opportunity Commission in its investigation of a charge against Plaintiffs; as such, the complaint cannot be viewed as an action arising under 42 U.S.C. Section 2000e *et seq.*



Upon said findings, this Court in its sound discretion and in the exercise of its inherent equitable power to impose a sanction upon Plaintiffs' attempt to utilize the federal judicial system to further said dilatory tactics, hereby assesses reasonable costs, including attorney's fees, in the amount of one thousand one hundred eighty dollars ($1180.00) against Plaintiffs and the same is hereby awarded to the Defendant United States Equal Employment Opportunity Commission, 6 Moore's Federal Practice 2d ¶ 54.77[2]; the Court has entered such award as a sanction against Plaintiffs for having filed in bad faith, vexatiously, and for oppressive reasons. *Hall* v. *Cole,* 93 S. Ct. 1943(1973); *Buchhalter* v. *Rude,* 54 F.2d 834 (10th Cir. 1932).

/s/ LUTHER BOHANON
United States District Judge

5-4-1977

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

---

No. 77-1531

---

THE OKLAHOMA PUBLISHING COMPANY, individually and on behalf of its OKLAHOMA GRAPHICS and NATIONAL PACKAGING DIVISIONS; GAYLORD BROADCASTING COMPANY and MISTLETOE EXPRESS SERVICE, *Appellants,*

v.

ETHEL BENT WALSH, Acting Chairman, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and COLSTON A. LEWIS and DANIEL E. LEACH, Commissioners, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Appellees,*

and

LUTHER B. EUBANKS, JUDGE, UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF OKLAHOMA, *Appellee.*

---

**Appeal From The United States District Court**
**For The Western District of Oklahoma**
**(D.C. # Civ. 77-0261-B)**

---

Submitted on the Briefs:

Before SETH, Chief Judge, DOYLE, Circuit Judge, and STANLEY, Senior District Judge.*

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PER CURIAM.

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* Of the District of Kansas, Sitting by Designation.



The appellants, Oklahoma Publishing Company and several subsidiaries, filed the present action to appeal an order granting defendant, Equal Employment Opportunity Commission, motion to strike the complaint under Rules 11 and 12(f), Fed.R.Civ.P. This proceeding is part of an ongoing investigation of appellant's books and records to determine whether there has been any violation of Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (1970 and Supp. V, 1975). It is the third attempt to reach this court on appeal and a review of prior proceedings is wholly unnecessary.

The appellants request a three-judge court to declare certain provisions of 42 U.S.C. § 2000e unconstitutional. They also contend that the award of attorney's fees was improper.

In our opinion of September 5, 1975, we said: ". . . the complaint at this stage must be viewed as an attempt to divert, forestall, or anticipate administrative proceedings." See also our opinion in No. 76-1625 of January 13, 1978. The subpoena duces tecum was a part of the administrative proceedings.

We affirm the trial court's order denying appellant's motion to alter or amend judgment.

In its oral opinion, the trial court said:

> ". . . I am convinced that this is nothing short of harassment. You have made up your mind that you are not going to follow the law, . . . and you are going to seek every remedy everywhere you can to see that you don't expose your books . . ."

The enforcement of the subpoena does not constitute an unreasonable search and seizure. We have made it unmistakably clear that the administrative action must be allowed to run its course before a broad-scale constitutional attack may be considered.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

---

No. CIV-74-295-E
No. CIV-76-0109-E
(Consolidated)

---

THE OKLAHOMA PUBLISHING COMPANY, individually and on behalf of its OHLAHOMA GRAPHICS and NATIONAL PACKAGING DIVISIONS, and WKY TELEVISION SYSTEM, INC. (a wholly-owned subsidiary of The Oklahoma Publishing Company), MISTLETOE EXPRESS SERVICE (a wholly-owned subsidiary of The Oklahoma Publishing Company), *Plaintiffs,*

vs.

JOHN H. POWELL, Chairman; LUTHER HOLCOMB, Vice-Chairman; COLSTON A. LEWIS, ETHEL BENT WALSH, and RAYMOND L. TELLES, Commissioners, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

and

LORENZO RAMIREZ, Director, REGION VI, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

and

TOM ROBLES, Director, ALBUQUERQUE DISTRICT, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Defendants.*

**Affidavit of Charles A. Kothe**

I, Charles A. Kothe, of lawful age, being first duly sworn upon oath, depose and say:

I am an attorney in Tulsa, Oklahoma, and represented The Oklahoma Publishing Company with respect to the Equal Employment Opportunity Commission investiga-



tion of a charge filed against that company by a Mr. David Williams. The EEOC charge number was YKCL-079.

The chronological history of the processing of that charge is set forth in Exhibit U to the Complaint. As is revealed by that history, the charge was filed in May of 1969, and then proceeded to circulate through three different EEOC offices, as well as the offices of the Oklahoma Human Rights Commission.

Finally, in January of 1973, the EEOC issued a Determination finding that the charge was true. That Determination contained numerous factual errors, including a finding that "very few Negroes [are] employed and they were assigned to menial tasks, e.g., sorting mail and washing walls."

Both before and after this Determination was issued, I informed various EEOC officials that the investigator had spent only some forty-five minutes touring the company's facilities, and that his finding on the "menial" tasks given to black persons was completely untrue. After the company received no relief from any EEOC officials, including the EEOC Chairman, the company advised me that they were going to write a number of Senators and Congressmen regarding what they considered to be the improper treatment they had received from EEOC.

On or about March 9, 1973, Mr. Edward L. Gaylord, the President of the company, wrote to a number of Senators and Congressmen, sending them the letter attached as Exhibit U to the Complaint. Shortly thereafter, I received a telephone call from a Mr. Ray R. Baca, Supervisor of Conciliations, with the Albuquerque EEOC office. Mr. Baca requested a meeting to discuss the Williams charge, and a meeting was subsequently arranged for April 6, 1973.

At the April 6, 1973 meeting, held in the company offices in Oklahoma City, both I and Robert Spahn, Pro-

duction Manager for the company, were present. Mr. Ray R. Baca attended for the EEOC.

At this meeting Mr. Baca appeared visibly upset. He spoke in a loud voice and had all the appearances of a man who had lost his composure. He stated that Mr. Spahn, Mr. Gaylord, and I would be put in jail for having written letters to the Congress. He also stated that the company would be "sorry" for having written those letters.

Mr. Baca then went on to state that if the company did not settle the Williams case with him, it would cost the company "seven million" to defend against an EEOC lawsuit. Finally, Mr. Baca concluded by saying that EEOC would "get" the company one way or another.

I tried to talk with Mr. Baca about the unfairness of the investigation, but he told me he was not interested in listening. I also tried to discuss the company's efforts in the equal opportunity area, but Mr. Baca interrupted me.

I told him that we had a job available for David Williams and offered to call him to make that fact known. Mr. Baca said that the man did not want the job; he wanted the money.

Mr. Baca then told me, in a very loud voice and while thrusting his finger at me, that "You better go into the next room and tell Mr. Gaylord that he'd better settle this case." I refused, and the meeting ended.

I then wrote a letter to Mr. Baca, attached hereto as Exhibit A, in which I expressed the belief that:

> If, indeed, time is being spent by attorneys for the Commission to determine whether a crime has been committed by a report having been sent to certain members of Congress it is an inexcusable waste of effort and public funds.



• • •

> The intent of Congress was not to punish private citizens for the exercise of their rights under the First Amendment. Neither was it intended that Congress be prohibited from learning of the abuses of the administrative process.

On April 23, 1973, I received a call from Mr. Baca, asking me if the company was willing to settle the Williams case. I told him that, in view of all of the circumstances involved in the case, we would not settle and would litigate.

I heard no more from Mr. Baca, and considered the case closed.

I have read the above and foregoing statement, consisting of four (4) pages, and it is true and correct to the best of my knowledge and belief.

/s/ Charles A. Kothe
Charles A. Kothe

Subscribed and sworn to before me this 6th day of April, 1976.

/s/ Maulci Smith
Notary Public

My Commission Expires:
August 7, 1979

[Caption Omitted in Printing]

**Affidavit of Robert H. Spahn**

I, Robert H. Spahn, of lawful age, being first duly sworn upon oath, depose and say:

I reside in Oklahoma City, Oklahoma, and have been employed by The Oklahoma Publishing Company in various capacities since 1937 to the present. I was Production Manager from 1954 until September, 1975.

In my capacity as Production Manager, I became aware of a charge filed against the Company by David Williams. The EEOC charge number was YKCL-079.

At various times during the investigation by EEOC of that charge (from 1969 until 1973), I consulted with our attorney, Charles A. Kothe, regarding the status of the case and materials needed for the investigation. All of the management was quite upset when we received the findings of fact and determination in the Williams case, as the case had never been really investigated by an EEOC investigator.

The only EEOC agent who ever did even a cursory investigation was a John Knoll. Mr. Knoll talked briefly with two individuals responsible for not selecting Mr. Williams, requested a 1969 "EEO-1 report" containing some broad statistics on how many minorities and women the Company had in various occupations, and toured the building. His entire tour took only about forty-five minutes.

When I received a copy of the findings of fact and determination, I was amazed that Mr. Knoll could have reached a conclusion that black employees were assigned to "menial" tasks, because Mr. Knoll had never even inquired as to what specific jobs were occupied by black workers. Had Mr. Knoll inquired, he would have discovered that there were quite a few black pressmen (one of our highest paid, skilled craft positions), there was a black



editorial writer, a black purchasing agent, several black supervisors, several black mailers (another high-paying craft position), as well as blacks in other responsible positions. At The Oklahoma Publishing Company, we do not consider jobs such as pressman, mailer, purchasing agent or editorial writer to be "menial jobs," nor do we believe that they are generally considered to be such in the industry.

Our attorney, Charles Kothe, was told to attempt to get the case reinvestigated, and, on our behalf, wrote to several different EEOC officials, including the Chairman of the EEOC. However, none of these officials would reopen the investigation.

As a result, Mr. Edward L. Gaylord decided to write to a number of Senators and Representatives regarding our experiences in dealing with EEOC. That letter is attached as Exhibit U to the Complaint, and detailed the chronological history of the four year "investigation" of the Williams charge.

Shortly after that letter was sent, in March of 1973, Mr. Kothe called me and told me that a Mr. Ray Baca wanted to have a meeting to discuss the Williams case. I was delighted, as I thought that we finally were going to get someone to listen to our complaints.

The meeting took place at our offices in Oklahoma City, Oklahoma, on April 6, 1973. Mr. Kothe, Mr. Baca and I were in attendance.

During the meeting, Mr. Baca told Mr. Kothe and me that we, together with Mr. Gaylord, would be sent to jail for having written to our Congressmen. Mr. Baca also stated that, unless the Company settled the Williams case, it would cost the Company "seven million dollars" to defendant against an EEOC lawsuit.

Mr. Baca went on to state that we would be "sorry" for having written the letters, and that EEOC was going

to "get" the Company. At one point in the conversation he pointed his finger at Mr. Kothe and said something to the effect of "you'd better tell Mr. Gaylord to settle this case." Mr. Kothe refused to get up and convey Mr. Baca's message.

Shortly thereafter, the meeting ended. I asked Mr. Kothe if Mr. Baca could legally throw us in jail for having written the letters to our Congressmen, and he replied "No."

I have read the above and foregoing statement, consisting of four (4) pages, and it is true and correct to the best of my knowledge and belief.

/s/ Robert H. Spahn
Robert H. Spahn

Subscribed and sworn to before me this 6th day of April, 1976.

/s/ Lynn McCrory
Lynn McCrory
Notary Public

My Commission Expires:
May 23, 1976



State of Oklahoma,
County of Tulsa, ss:

**Affidavit**

I, Mary T. Matthies, of lawful age, being first duly sworn upon oath, depose and say:

I am the attorney for the Appellants in *The Oklahoma Publishing Co., et al, v. EEOC,* Tenth Circuit Case No. 76-1625. On September 28, 1977, I appeared at oral argument of the above case on behalf of the Appellants.

After oral argument was concluded, I had the occasion to meet Mr. Samuel Dashiell, who is a Supervisory Attorney with the Denver Regional Litigation Center of the EEOC. Several of us, including Mr. Dashiell and my opposing counsel, Mr. McPhie, went to lunch after oral argument, and were discussing the above case.

Mr. Dashiell commented to me that: "I guess I am the one who is responsible for this whole mess (referring to the suit by Appellants against EEOC)." I later inquired of Mr. Dashiell as to what had prompted this comment.

Mr. Dashiell explained that it used to be the practice for Litigation Center attorneys to go to the various EEOC District Offices in order to review cases for possible litigation. He told me that he visited the Albuquerque District Office sometime in 1973, and was given several files in which conciliation had failed, and which the Albuquerque Office wanted him to review for possible litigation. One of the files was a charge by David Williams against The Oklahoma Publishing Company.

Mr. Dashiell told me that he reviewed the David Williams file, and concluded that EEOC could not sue with respect to the charge, because Mr. Williams had sought to establish an independent contractor relationship which was outside the jurisdiction of Title VII. Mr. Dashiell told me that he informed the Albuquerque District Office of his conclusions, and that he was the one who gave the Albu-

querque office the idea that, if they wished to pursue possible litigation against OPUBCO, they could always request the issuance of a Commissioner charge.

Mr. Dashiell told me that it was his understanding that the Albuquerque District Office then requested issuance of the Commissioner charges which are the subject of the above-styled action, because of his advice that EEOC could not proceed on the Williams charge. Mr. Dashiell did tell me that he had no knowledge of the threats to OPUBCO in the Williams case, or of the letters by OPUBCO to its Congressmen, at the time that he reviewed the Williams file and had discussed the possibility of the Albuquerque Office requesting Commissioner charge. I told Mr. Dashiell that I was sure that he did not, but that the Albuquerque Office knew of these matters, and that they were the ones who decided to request the Commissioner charges.

At this point we changed the subject, and started discussing new EEOC case-handling procedures and the above conversation ended.

I have read the above and foregoing Affidavit, consisting of three (3) pages, know the contents thereof, and the same is true and correct to the best of my knowledge and belief.

/s/ MARY T. MATTHIES
Mary T. Matthies

Subscribed and sworn to before me this 30th day of September, 1977.

/s/ SUE CUNNINGHAM
Sue Cunningham
Notary Public

My Commission Expires:
3-22-80

No. 78-116

# In the Supreme Court of the United States

OCTOBER TERM, 1978

THE OKLAHOMA PUBLISHING CO., ET AL., PETITIONERS

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

ABNER W. SIBAL,
*General Counsel,*

JOSEPH T. EDDINS,
*Associate General Counsel,*

BEATRICE ROSENBERG,
*Assistant General Counsel,*

NEIL A. G. MCPHIE,
*Attorney,*
*Equal Employment Opportunity Commission,*
*Washington, D.C. 20506.*

# In the Supreme Court of the United States

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*v.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

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**BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION**

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## OPINIONS BELOW

The opinions of the court of appeals in the two cases in which certiorari is sought (No. 76-1625, Pet. App. 30a-31a and No. 77-1531, Pet. App. 36a-37a) are not reported. The district court opinions (Pet. App. 15a-29a and 34a-35a) are not reported. An earlier related opinion of the court of appeals in No. 74-1676 (Pet. App. 11a-14a) is also unreported.

## JURISDICTION

The judgment in No. 76-1625 (Pet. App. 30a-31a) was entered on January 13, 1978, and a petition for rehearing was denied on April 6, 1978 (Pet. App. 32a-33a). The judgment in No. 77-1531 (Pet. App. 36a-37a) was entered on March 16, 1978. On June 2, 1978, Mr. Justice White

extended the time for filing a petition for a writ of certiorari in both cases to and including July 21, 1978. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the court of appeals properly directed that an inquiry into allegations of impropriety by the Equal Employment Opportunity Commission (EEOC) in the filing of a Commissioner's charge of discrimination against petitioners be deferred to the completion of the agency's administrative process.

2. Whether the statutory scheme for enforcement of administrative subpoenas violates the Fourth Amendment.

## STATEMENT

1. In October 1973, EEOC Commissioner Ethel Bent Walsh filed a "Commissioner's charge"[1] against petitioners alleging systemic discrimination in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (1970 ed. and Supp. V) 2000e *et seq.*.

Asserting that the charge was filed in retaliation for their critical reports to Congressmen concerning an earlier EEOC investigation,[2] petitioners filed an action in the Western District of Oklahoma seeking an injunction against any proceedings under the charge. The district court dismissed the complaint, holding that the suit was premature. On

[1]See, Section 706(b) and (d) of Title VII of the Civil Rights Act of 1964, 78 Stat. 259, as amended, 42 U.S.C. (and Supp. V) 2000e-5(b) and (d) (Pet. App. 1a-3a).

[2]The allegation of retaliation was based largely on the fact that Commissioner Walsh filed her charges some seven months after an unnamed agent of the EEOC had purportedly threatened petitioners with a lawsuit. The Commissioner in response to interrogatories swore that she was briefed as to petitioners' employment practices only by her Special Assistant, and that she had no knowledge that any of the petitioners had written to their Congressmen.



appeal, the court of appeals ordered reinstatement of the complaint but directed that it lie dormant until completion of the EEOC's administrative proceedings. The court of appeals directed the trial court to fix a reasonable time for completion of the administrative action (Pet. App. 13a-14a).

2. After remand, petitioners refused voluntarily to provide the EEOC with information or to honor an administrative subpoena for such information. When EEOC sought judicial enforcement of the subpoena, petitioners again raised the issue of bad faith in the filing of the charge.[3] The district court ruled that subpoena enforcement was part of the administrative process and that, under the mandate of the court of appeals, petitioners' claims of bad faith were not to be heard until the administrative process was completed (Pet. App. 18a). With some minor modification, the court ordered the subpoena enforced, finding it reasonable in scope and within the authority of the Commission (Pet. App. 19a-23a). In January 1978, the Tenth Circuit affirmed the district court's order (Pet. App. 30a-31a). The court of appeals stated (Pet. App. 31a):

> The subpoena is clearly part of the administrative proceedings referred to in our previous opinion which must be allowed to go forward as therein ordered.

The petition for a writ of certiorari in part seeks review of that judgment.

[3]At this stage in the proceedings, petitioners' allegations of an EEOC vendetta were based solely on the allegations in its earlier complaint (CIV-74-295-E). However, before the district court ruled in this action, petitioners included in the record the affidavits of its attorney, Charles A. Kothe, and its production manager, Robert H. Spahn (Pet. App. 38a-44a). Except for providing the name of the EEOC agent who allegedly made the threat, the affidavits added nothing new.

3. Petitioners' applications for a stay pending appeal of the order directing subpoena enforcement were denied by the Tenth Circuit and by Mr. Justice White in March 1977.[4] Shortly thereafter, petitioners simultaneously filed a third suit in the district court (Civ. 77-0261-B) and, in the Tenth Circuit, a "Suggestion of Lack of Jurisdiction by the Court of Portion of Appeal."[5] In addition to the three EEOC Commissioners then holding office, petitioners' complaint named United States District Judge Eubanks as a defendant. The thrust of the allegations was two-fold: (1) that the Commissioners and Judge Eubanks had violated the Fourth Amendment by subpoenaing petitioner's records without permitting a prior inquiry into whether the charge which gave rise to the EEOC's investigation was based on "probable cause"; (2) that the statutory provisions of Title VII—Sections 709 and 710—under which the subpoena was issued and enforced, violate the Fourth Amendment because they do not provide for an inquiry into "probable cause" or permit challenges pertaining to the alleged EEOC vendetta against petitioners until the EEOC has completed its administrative processes.

The district court (Bohanon, J.) dismissed the complaint. The court (Pet. App. 34a-35a) found the complaint

> sham, frivolous, vexat[ious] and filed in bad faith as a dilatory tactic for the sole purpose of further delaying

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[4]On June 24, 1977, in the district court, petitioners sought a limited protective order from the district court's order of June 18, 1976, enforcing the subpoena. The district court (Eubanks, J.) denied this request on September 12, 1977, noting "* * * EEOC's contention that this motion is but part and parcel of a strategy of obfuscation is not unreasonable."

[5]The Tenth Circuit denied petitioner's suggestion of lack of jurisdiction in April, 1977.



> or impeding the administrative process of the United States Equal Employment Opportunity Commission in its investigation of a charge against Plaintiffs * * *.

The Tenth Circuit affirmed the district court, stating (Pet. App. 37a):

> The enforcement of the subpoena does not constitute an unreasonable search and seizure. We have made it unmistakably clear that the administrative action must be allowed to run its course before a broad-scale constitutional attack may be considered.

The petition for a writ of certiorari seeks review of that judgment as well as the holding that petitioners must comply with the EEOC subpoena.

## ARGUMENT

1. Petitioners argue the case as if the courts below had precluded them from ever obtaining a hearing on their claim that the Commission was proceeding in bad faith. While, in our view, the courts would have been justified in ruling that petitioners had never made sufficient allegations to justify a hearing on their claims of bad faith,[6] that is not what the

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[6]Petitioners alleged that an unnamed EEOC investigator made threats that petitioners would suffer for writing a letter to a Congressman criticizing a prior EEOC investigation of a charge, and that, some seven months later, a charge was filed by a Commissioner. They presented no facts indicating even a slight connection between the investigator and Commissioner Walsh or the Commission as a body.

In *H. Kessler & Co.* v. *Equal Employment Opportunity Commission*, 53 F.R.D. 330, 337-339 (N.D. Ga.), affirmed, 468 F. 2d 25 (C.A. 5), modified *en banc*, 472 F. 2d 1147, certiorari denied, 412 U.S. 939, the court refused to find a "conspiracy" between EEOC officials and a charging party, on a record that included more detailed allegations of collusion than this case. The court termed them "insufficient to elevate the issue of the Commission's good faith to a substantial question deserving of further inquiry by the Court" (53 F.R.D. at 339).

court below held. In its first opinion, the court of appeals did find that because of the mixture of allegations as to constitutional rights and procedural irregularities, the complaint "at this stage must be viewed as an attempt to divert, forestall, or anticipate administrative proceedings" (Pet. App. 13a). Its actual ruling, however, was that petitioners' claims could more efficiently be considered at the close of the administrative process than at the beginning. In directing reinstatement of the complaint, the court of appeals held that petitioners would have a right to a hearing when that process was completed.

Petitioners showed no disposition to allow the administrative process to be completed. Rather, they constantly sought to delay it, first by refusing to furnish information voluntarily and then by refusing to obey an administrative subpoena (and later by trying to delay court ordered production). Under the circumstances, as the court below held, the subpoena enforcement proceeding in the district court, the subject matter of this suit, is properly viewed as merely part of the administrative process which the court of appeals had ordered completed before petitioners' various attacks on that process, including the claim of bad faith, could be heard.

That decision, limited to the particular facts of this case, is thus not in conflict with the decisions on which petitioners rely to the effect that, in an exceptional case, on a substantial showing of abuse of process, a court in a subpoena enforcement proceeding may conduct a threshold inquiry into the reasons underlying an investigation. *United States* v. *Powell*, 379 U.S. 48, 57-58; *Donaldson* v. *United States*, 400 U.S. 517, 526-527; *United States* v. *Bisceglia*, 420 U.S. 141, 146. *Powell* and the decisions following it do not require delay of an investigation to inquire into every claim of bad faith. See *United States* v. *Newman*, 441 F. 2d 165, 169 (C.A. 5). As this Court stated in *Donaldson*, *supra*, 400



U.S. at 529, "*Powell* was not intended to impair a summary enforcement proceeding so long as the rights of the party summoned are protected and an adversary hearing, if requested, is made available."

Since petitioners can make their challenges at the end of the administrative process, and since the EEOC cannot file a suit until it finds reasonable cause and conciliation fails, petitioners have suffered no real harm by the deferral of a hearing on their allegations until completion of the administrative process.[7]

2. Petitioners' suit, challenging the constitutionality of Title VII's statutory subpoena provisions, which require court enforcement, was properly dismissed as frivolous. It was, as the courts below found, a blatant attempt to avoid the effect of the denial of a stay of the enforcement order pending review. Moreover, the complaint on its face was without merit.

To the extent that the action was predicated on the claim that it was unconstitutional to deny petitioners the right to assert bad faith as a defense to the subpoena, petitioners were attacking, not the statute, but the interpretation given to the statute by the district court and the court of appeals. That issue, as noted, was already pending in the court of appeals when the complaint was filed.

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[7]In 1978, the district court (Eubanks, J.), *sua sponte*, dismissed the suit without prejudice. Noting that "the history of this investigation is fraught with instances of delay, diversion and obfuscation," the court concluded that, "at the time the matter was before the Court of Appeals more than two and one-half years ago, it could not have been foreseen that the period of dormancy would extend with Rip Van Winkle-like projection." The dismissal is, however, without prejudice to petitioners' right to reinstate the case, if that became necessary, and is conditioned on the waiver by EEOC of any limitations defense. Discovery already accomplished may be fully utilized in any subsequent action. Thus, petitioners' right to a hearing is not impaired.

Beyond that, petitioners, in the courts below, endeavored to assert the long discredited notion that an administrative subpoena is a search and seizure which cannot be permitted without a showing of probable cause. See *United States* v. *Powell*, 397 U.S. 48, 57; *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 194-195, 208-209. In this Court, they argue that under the ruling in *Marshall* v. *Barlow's, Inc.*, No. 76-1143, decided May 23, 1978, the statute is unconstitutional in permitting enforcement of a subpoena relating to a Commissioner's charge without an affirmative showing of the facts establishing reasonable cause for the charge.

The relevance of *Barlow's*, which dealt with entry for inspection, is not apparent. Neither Section 709 nor Section 710 permits the Commission to enter, inspect, or remove private property without the owner's permission, except pursuant to a court-enforced subpoena. Moreover, *Barlow's* dealt with a situation in which there was wholly lacking the opportunity for any type of judicial review. The subpoena enforcement provisions of Title VII include judicial review procedures.

Petitioners admit that a written charge by a person aggrieved is enough showing of cause to support a subpoena, but argue that the sworn charge of an EEOC Commissioner, a responsible government official, to the effect that she had probable cause to believe that the companies were violating Title VII, does not constitute a valid basis for an investigation. They offer no authority for this novel proposition. To the extent that they are seeking indirectly to re-argue the point made below, that the charge was not specific enough to support the investigatory process, they are raising an issue consistently rejected by the courts of appeals. See *e.g.*, *New Orleans Public Service, Inc.* v. *Brown*, 507 F. 2d 160 (C.A. 5); *Equal Employment Opportunity Commission* v. *University of New Mexico, Albuquerque, New Mexico*, 504 F. 2d 1296, 1304 (C.A. 10), and cases cited therein; *Local No. 104, Sheet Metal Workers International Association* v. *Equal Employment Opportunity Commission*, 439 F. 2d 237 (C.A. 9); *Bowaters Southern Paper Corp.* v. *Equal Employment Opportunity Commission*, 428 F. 2d 799 (C.A. 6), certiorari denied, 400 U.S. 942.



## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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ABNER W. SIBAL,
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SEPTEMBER 1978.

DOJ-1978-09

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

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**No. 78-116**

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THE OKLAHOMA PUBLISHING COMPANY, *et al.*,
*Petitioners,*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## PETITIONER'S REPLY BRIEF

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

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## PETITIONER'S REPLY BRIEF

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### ARGUMENT

#### 1. The *United States* v. *Powell* Issue.

The Court of Appeals erred fundamentally in denying OPUBCO a hearing on the bad faith issue and this error is apparent in the manner the EEOC's Brief in Opposition deals with the dilemma in which the Commission finds itself. At first, the Commission suggests that the Court of Appeals, by considering certain unique circumstances, denied the requested

hearing by a decision "limited to the particular facts of this case" (EEOC Brief, p. 6) and did not render a decision in conflict with *United States* v. *Powell,* 379 U.S. 48, 57-58 (1964).

Nothing could be farther from the case. Rather than distinguishing *Powell* by a close reading of certain facts, the Court of Appeals, in straight forward and categorical fashion, held that OPUBCO must await the completion of the entire EEOC administrative investigation before any hearing on its claims could be had. Rather than considering any facts as unique, the case was treated as routine and no attempt was made to distinguish *Powell.* Indeed, *Powell* was never mentioned. Certiorari Petition, 30a-33a, 36a-37a.

Moreover, it is noteworthy that the Commission's brief makes no attempt to supply those "peculiar facts". This failure is perfectly consistent with the Commission's position taken earlier in this litigation in which the Commission argued that OPUBCO should be permitted a hearing on its claims once investigation of the charges reached the subpoena enforcement stage. EEOC Brief, pp. 5-16, U.S. Court of Appeals for the Tenth Circuit, No. 74-1676. Thus, rather than seeking to delay, OPUBCO's opposition to subpoena enforcement was precisely in keeping with the Commission's suggestion.

Next, the Commission argues that OPUBCO's "claims could more efficiently be considered at the close of the administrative process than at the beginning" (EEOC Brief, p. 6) and that OPUBCO will suffer no real harm because of the deferral (*Id.* at p. 7). First, it could hardly be more efficient to conduct an entire and lengthy investigation and follow it by the sought hearing when establishment of OPUBCO's claims at the hearing would bar the conduct of the investigation.[1]



Of far more importance is that OPUBCO, by its claim, seeks to avoid having to undergo an investigation motivated only by a desire to punish and harass OPUBCO. Of what utility is the hearing after OPUBCO has been compelled to endure that which success at the hearing is designed to avoid? *Powell* and its progeny stand for the proposition that a court's process is not to be abused and it is enforcement of the Commission's subpoena that is claimed to constitute the abuse. If no hearing can be had on this claim until after the subpoena is enforced and other equally infected aspects of the investigation are endured, no *post hoc* finding sustaining OPUBCO's claims can undo the abuse of the court's process or vindicate OPUBCO's right to be free of such abuse.[2]

Finally, the Commission does not challenge the ongoing viability of *Powell* and it concedes, as it must, that the Court of Appeals did not find that OPUBCO's

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[1] It is not clear whether the Commission's "efficiency" argument signals that it has abandoned the exhaustion of administrative remedies doctrine upon which the lower courts appeared to base their decisions. We note, however, that the Commission has made no effort to support the Court of Appeals' decision on this ground. As noted in OPUBCO's Petition herein (pp. 10-11), such an abandonment would be appropriate. *Public Utilities Commission* v. *United States,* 356 U.S. 534, 540 (1958); *Mancusi* v. *De Forte,* 392 U.S. 365, 371 (1968).

[2] In any event, questionable efficiency appears a hardly sufficient justification in the face of a substantial constitutional claim. As in the criminal context, the mere provision of a subsequent hearing at which constitutional injury may be sought to be undone does not justify ignoring the earlier claim that such injury likely will occur.

claims were insufficient to warrant a *Powell* hearing. It nevertheless argues that OPUBCO's showing in fact was inadequate (EEOC Brief, pp. 5-6, n.6). Reluctantly, however, the Commission noted that an undenied threat of a Commission proceeding against OPUBCO in retaliation for refusing to settle an earlier case was followed by the commissioner's charges. The Commission neglected the other matters substantiating OPUBCO's claim and, without detailing them,[3] it should be asked what showing is more substantial than a threat come to fruition? Moreover, the showing made by OPUBCO was at least as substantial as any made in those cases in which courts have required *Powell* hearings. *Powell* requires only that a subpoena respondent raise "a substantial question that judicial enforcement of the administrative summons would be an abuse of the court's process". 379 U.S. at 51. *Powell* does not require ultimate proof of the claim, that being the burden to be carried at the hearing by testimony and any appropriate discovery in aid of the proof.[4]

**2. The *Marshall* v. *Barlow's Inc.* Issue.**

In support of its claim that *Barlow's* is irrelevant, the Commission notes that Title VII does not permit unconsented entry or inspection without a court order and that the *Barlow's* situation, unlike that presented here, was one in which no provision for judicial review of agency inspection action existed (EEOC Brief, p. 8). Thus, it is said that *Barlow's* is irrelevant.[5] All of the foregoing is beside the point. The question presented here is not whether judicial review is or is not available; rather, the question is as to what standards must the Commission be held when seeking enforcement of its subpoena?[6]

*Barlow's* answered this question in the OSHA context by requiring the agency to demonstrate that its purpose in inspecting was in keeping with a "general administrative plan for enforcement" or was based on probable cause to believe the Act was being violated. The former test could be satisfied merely by showing that an employer's premises routinely were scheduled for inspection. It is not a substantial burden and would not be a substantial burden for the Commission in Title VII litigation.[7] Yet the Commission appears to argue that no showing beyond the fact of a commissioner's charge is necessary in order to validate an investigation of it by subpoena.

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[3] See Certiorari Petition herein, pp. 12-14, 38a-46a.

[4] OPUBCO hardly can be faulted, as the Commission attempts (EEOC Brief, p. 2, n. 2), for failing to adduce all evidence necessary to prove its claims before the District Court when available evidence not yet produced is in the possession of the Commission alone and some discovery will be required to extract it. *United States* v. *Satter*, 432 F.2d 697 (1st Cir. 1970); Rule 81(a), Federal Rules of Civil Procedure.

[5] The Commission also argues that the filing of the constitutional challenge in the District Court, was merely a bald attempt to avoid the effect of the stay request denied in the subpoena case. To the contrary, OPUBCO's constitutional challenge following subpoena enforcement was precisely the conduct followed in *Barlow's* (where no appeal was taken from the enforcement order) and such conduct was conceded to be proper by the government. 98 S.Ct. at 1819, n. 4.

[6] The Commission's distinctions are inaccurate. Unconsented entry absent a court order is permitted in neither the OSHA nor Title VII context. *Compare* 42 U.S.C. § 2000e-8(a), 9 *and* 29 U.S.C. § 161 *with* 29 U.S.C. § 657(a).

[7] Significantly, the Commission does not assert that the application of *Barlow's* criteria to its investigative efforts would impede them in the slightest. Moreover, a requirement of some showing of "probable cause" is hardly "long discredited." *See* v. *City of Seattle*, 387 US. 541, 544-45 (1967).

This approach stands *Barlow's* on its head. It is akin to arguing that an OSHA inspector may demand admittance simply by showing his credentials and an internally generated piece of paper from the agency instructing him to inspect. However, this is precisely the argument rejected by this Court in *Barlow's.*[8]

The reason that an individual's sworn charge claiming a Title VII violation as to himself is sufficient to establish the Commission's right to investigate is that it is purely a matter of routine[9] from the Commission's point of view. It is the manner contemplated by the Act by which an investigation would commence and proof of the existence of that charge, without proof of its allegations, would be the affirmative showing contemplated by *Barlow's* requirement that the agency be proceeding in accordance with its "general administrative plan for enforcement."

Commissioner's charges are another matter. They are not routine, they are wholly internally generated, and the Commission cannot point to some outside source with whom it is not associated and claim that the charge emanated from that source with the Commisssion's action merely being a routine response.

[8] An unadorned commissioner's charge should stand in no better position than similar statements previously rejected by this Court. *Mancusi* v. *DeForte*, 392 U.S. 364, 371 (1968); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 391 (1920). This is especially the case when Commissioner Walsh had to admit that the dates, places, and circumstances of the alleged violations supporting her charges were "unavailable" to her. *See* Certiorari Petition herein, p. 13.

[9] These charges constitute the overwhelming majority of the Commission's activity and invariably are brought without prior involvement by the Commission.



Whether generated by one of its district offices as is likely in this case or whether developed within its Washington, D. C. headquarters, a commissioner's charge emanates from within and, as Commissioner Walsh claims, frequently is based on some facts constituting reasonable cause to believe the charge may be true.

It is not too much to require the Commission to adduce at a hearing the matters upon which it relies for investigating especially when a subpoena respondent has fairly raised the question of the Commission's right to proceed. The Commission need not prove that a violation of the Act has occurred or even that all of the matters on which it relies are true, but it must show that there are legitimate factors warranting the commissioner's issuance of the charge. If such a basis exists, it will be a simple matter to demonstate it,[10] and this demonstration is all that *Barlow's* requires.

For these reasons, a writ of certiorari should be issued to review the judgments and opinions of the Court of Appeals.[11]

[10] *E.g.*, proof that an employer met the criteria for inclusion in the Commission's "Systemic Program," or that a charge was requested to provide anonymity or to provide for case consolidation. *See EEOC Compliance Manual*, §§ 3, 16. Contrary to the Commission's suggestion (EEOC Brief, pp. 8-9), OPUBCO does not seek a more specific charge so that it may better defend; rather, it seeks the assurance allowed by *Barlow's* that the Commission's investigation is proper and consistent with the Act.

[11] Although a specific consideration by this Court of the *Barlow's* issues may be required in order flesh out the applicability of that holding to Title VII litigation, the manifest applicability of *Powell* would warrant summary reversal if the Court were to grant the instant Petition only as to the *Powell* issues. On remand, the *Barlow's* issues could be addressed.

Respectfully submitted,

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